Memorandum No. 39(1961)

Subject: Study No. 34(L) - Uniform Rules of Evidence - Hearsay

Attached to this memorandum on blue paper is the tentative recommendation relating to hearsay. It has been revised in accordance with the directions of the Commission at the August meeting. Editorial changes have been made in virtually all of the comments relating to various subdivisions. These changes have been made in the light of suggestions made by individual commissioners. As the changes are not substantive they are not indicated in the tentative recommendation. The matters noted and discussed below have not as yet been finally determined by the Commission.

Rule 62(6).

At the August meeting the Commission decided that the language of paragraph (c) and (d) should be revised to conform to the language used to define unavailability in Code of Civil Procedure § 2016. The Commission withheld a decision on whether paragraph (e) should also be revised to conform to the language used in Code of Civil Procedure § 2016(d)(3)(iv). In this connection the staff was asked to do research upon the meaning of the language in § 2016, "that the party offering the deposition has been unable to procure the attendance of the witness by subpoena." The staff was asked to determine whether this language requires a showing of diligence on the part of the person offering the deposition into evidence.

The research study attached as Exhibit I (pink pages) indicates that apparently a showing of diligence is required under the existing language of Code of Civil Procedure Section 2016(d)(3)(iv). Inasmuch as

the requirement does not clearly appear from the language of Section 2016, the staff recommends that the language of paragraph (e) of Rule 62(6) be retained in the form that it appears in the tentative recommendation. This language has been previously approved by the Commission.

Rule 62(8).

This subdivision has been revised to include the matter formerly contained in subdivisions (8) and (9). This revision was made to make clear that the former testimony exceptions do not apply to depositions taken in the same case.

Rule 63(3).

The staff suggests that the preliminary language of this rule would be easier to understand if it were rephrased. The staff suggests that the words "and objections based on competency or privilege which did not exist at that time" be deleted so that the introductory clause would read:

> (3) Subject to the same limitations and objections as though the declarant were testifying in person (other than objections to the form of the question which were not made at the time the former testimony was given), former testimony if the judge finds that the declarant is unavailable as a witness at the hearing and that:

The following sentence should be added to subdivision (3):

> Objections to former testimony offered under this subdivision which are based on the competency of the declarant or upon privilege shall be determined by reference to the time the former testimony was given.

Rule 63(3.1)

The staff suggests a similar change in this subdivision. The clause "(other than objections based on competency or privilege which did not

exist at the time the former testimony was given)" should be deleted and the sentence suggested above under subdivision (3) added at the end of the subdivision.

Rule 63(6).

In connection with paragraph (c) of this subdivision, the staff has noted that two bills have been introduced in the Congress of the United States relating to this rule as it is applied in the federal courts. S 2067, introduced in the Senate on June 13, would repeal this rule for all federal courts. HR 7053, approved by the House of Representatives on June 13 and sent to the Senate, would repeal the rule for the District of Columbia. Both bills are now pending in the Senate. The staff will keep the Commission advised if there is any change in the status of these bills.

Rule 63(9).

Commissioner Stanton has questioned the absence of a reason for limiting subdivision (9)(c) to civil actions or proceedings. The staff does not know why this exception was limited to civil actions or proceedings and, accordingly, could not state a reason in the comment. The existing law--Code of Civil Procedure Section 1851--is not limited to civil actions or proceedings and the staff is unaware of any reason for adding the limitation to subdivision (9)(c).

A further discussion of Section 1851 and subdivision (9)(c) appears later in this memorandum in connection with the problem of whether Section 1851 should be repealed.

Rule 63(22).

At the August meeting a sentence explaining the reason for this

exception was deleted. The sentence read:

> Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivisions (27) and Code of Civil Procedure Section 1870(11).

The Commission then directed the staff to do research upon this exception to determine the reasons given for it in the cases recognizing the exception.

The research study on this matter is attached as Exhibit II (yellow pages). The study traces the historical development of the exception. As the study indicates, the best justification for the exception is as follows: Reputation as to matters of public interest is received generally because it is usually the best evidence, from the nature of the case, that can be produced. A judgment, however, in an adversely litigated case is a more reliable form of evidence than reputation; hence, since we are seeking the best evidence that from the nature of the case can be produced, a judgment upon a matter of public concern should be received if reputation is going to be received.

The Commission should note that the English doctrine is applicable to judgments in cases litigated between private parties. It is not limited--as subdivision (22) now is--to judgments in which a public body is represented.

If subdivision (22) is to be retained, the staff recommends the retention of the sentence (quoted above) which was deleted at the August meeting.

Rule 63(29)(29.1).

The staff has placed the language that formerly appeared in (29)(b) in a new subdivision numbered (29.1). This is merely a technical change;

the language of the two subdivisions is as previously approved by the Commission.

Adjustments and Repeals of Existing Statutes

Code of Civil Procedure Section 1851.

At the August meeting, the Commission deferred action upon this section pending a report from the staff upon the cases arising under it. This report is attached as Exhibit III (green pages). The staff has concluded that Section 1851 permits admission of a form of hearsay evidence not now covered in the URE. When the liability of a defendant in an action is grounded upon the liability of another, Section 1851 permits the admission of a judgment against such other person as evidence of such liability. To make the URE rules complete as to the use of judgments as hearsay evidence, the staff suggests the addition of a subdivision (21.1) which, with its comment, would read as follows:

(21.1) When one of the issues in a civil action or proceeding is the legal liability, obligation or duty of a third person, evidence of a final judgment against such person to prove such legal liability, obligation or duty, when offered by a person who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision restates in substance a principle of existing California law which is found in Section 1851 of the Code of Civil Procedure.

If proposed subdivision (21.1) is approved, the staff recommends the

addition of a paragraph to the Comment on subdivision (9). The added paragraph would read:

> Subdivision (21.1) supplements the rule stated in paragraph (c). It permits the admission of judgments against a third person when one of the issues between the parties is a legal liability of the third person and the judgment determines that liability. Together, paragraph (c) and subdivision (21) codify the holdings of the cases applying Code of Civil Procedure Section 1851.

Sections 1893 and 1901. At the August meeting, the question arose as to whether the reference to "public writings" which appears in both of these sections embraces more than the "official record" reference contained in subdivision (17). The staff has concluded that, if there is any difference between the terms, the term "public writings" is probably the narrower term. A research memorandum, labeled Exhibit IV, is attached hereto on white paper.

On the basis of this conclusion, the staff recommends that Section 1893 be modified and that Section 1901 be repealed as indicated in the tentative recommendation. This action has been previously approved by the Commission.

Sections 1920 and 1926. At the August meeting, the staff was asked to review the cases arising under these sections to determine whether these sections give a presumption of verity to the recitals in public

documents of various sorts (such as ordinances) so that such documents may be introduced as evidence without calling the custodian or some other witness to identify the record and testify as to its mode of preparation. The staff's research memorandum on this subject (on goldenrod paper) is attached to this memorandum as Exhibit V.

The staff has concluded that these sections are not needed to create a presumption in favor of the recitals in public documents. This purpose is adequately achieved by the presumption that official duty has been regularly performed. (C.C.P. § 1963(15).) If these sections serve any purpose, it is to permit the court to determine that the mode of preparation of a public record is such as to indicate its trustworthiness from evidence other than the testimony of the custodian or other qualified witness -- as, for instance, by judicial notice. If these sections are repealed and subdivision (13) is relied on as the sole authority for the introduction of official reports, a qualifying witness will be required to testify in each case.

The staff believes that it is desirable to preserve the rule that a court may admit official reports without hearing testimony from a qualifying witness in those situations where it can determine from judicial notice and the presumption that official duty has been regularly performed that the official report is reliable and not based upon hearsay. This rule may be preserved either by amending subdivision (13) to indicate that the identity and mode of preparation of a record may also be established by evidence other than the testimony of the custodian or other qualified witness. The rule may also be preserved by revising subdivision (15)

so that it restates existing law in this regard; and the staff recommends this alternative. The revised subdivision (15) and the comment thereto would read as follows:

(15) [~~Subject to Rule 64~~] A written report[~~s or findings of fact~~] made by a public [~~official~~] officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such [~~official~~] officer or employee and that the sources of information, method and time of preparation were such as to indicate its trustworthiness. [~~it was his duty (a) to perform the act reported, or (b) to observe the act, condition or event reported, or (c) to investigate the facts concerning the act, condition or event and to make findings or draw conclusions based on such investigation;~~]

COMMENT

Subdivision (15) has been revised to restate in substance the existing California law as found in Code of Civil Procedure Sections 1920 and 1926 as they have been interpreted by our courts.

Paragraphs (a) and (b) as proposed in the URE permitted the admission of official reports only if the officer who made the report had personal knowledge of the facts reported. Under existing California law, an official report may be admitted even though the public officer making the report does not have personal knowledge of the facts if a person with such personal knowledge reported the facts to the public officer pursuant

to a legal or official duty. No reason is apparent for limiting this exception to the hearsay rule as proposed in the URE.

Paragraph (c) as proposed in the URE would permit the introduction of police reports based on statements of witnesses interviewed at the scene of an accident and other official reports of a similar nature. Such reports are not admissible now because they are not based upon statements made to the reporting officer pursuant to a legal or official duty. There is not a sufficient guarantee of the trustworthiness of such reports or findings to warrant their admission into evidence.

The evidence that is admissible under this subdivision as revised is also admissible under subdivision (13), the business records exception. However, subdivision (13) requires a witness to testify as to the identity of the record and its mode of preparation in every instance. Under this subdivision, as under existing law, the court may admit an official report without requiring a witness to testify as to its identity and mode of preparation if the court has judicial notice that the report was prepared in such a manner as to assure its trustworthiness.

The cross reference to URE Rule 64 has been deleted because the Commission does not recommend approval of Rule 64. (See the comment on Rule 64.)

Penal Code § 686. Some of the problems involved in Penal Code § 686 were developed quite fully in the Supplement to Memorandum No. 7(1961) dated 2/6/61. That discussion will not be repeated here. It is sufficient to point out here that § 686 states the defendant's right to confront the witnesses against him. Three exceptions are stated:

(1) Testimony at the preliminary examination may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(2) Testimony of a prosecution witness contained in a deposition taken under the provisions of Section 882 of the Penal Code may be read if the witness is "dead or insane or cannot with due diligence be found within the state."

(3) Testimony of a witness for either prosecution or defense given on a former trial of the same action may be read if the witness is "deceased, insane, out of jurisdiction" or "cannot with due diligence be found within the state."

Although the right of confrontation might be considered to be applicable to hearsay generally, the cases have apparently construed this section so that it applies to hearsay that is admitted under the former testimony exception only. Hence, hearsay is admissible despite the declaration of this section and despite the fact that the particular hearsay involved does not fall within one of the stated exceptions of this section.[1]

When the Commission considered Rule 63(3), it assumed that the rule would be applicable to prosecution and defendant alike. Hence, standards were drafted to protect the defendant's right of confrontation. This

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1. People v. Alcalde, 24 Cal.2d 177 (1944)(hearsay of victim admitted under state of mind exception); People v. Weatherford, 27 Cal.2d 401 (1945)(hearsay of decedent admitted under declaration against interest and state of mind exceptions); People v. Gordon, 99 Cal. 227 (1893)(testimony of witness at prior trial of same action inadmissible - third exception to right of confrontation was not enacted until 1911).

assumption was not correct. In People v. Bird, 132 Cal. 261 (1901), the Supreme Court pointed out that Penal Code Section 686 prohibits the prosecution from introducing former testimony except as provided in that section; but the defendant is not restricted by Section 686 - he may introduce any former testimony admissible under the general hearsay rule. Under Section 686, the prosecution may introduce only testimony taken at the preliminary hearing in the same case, testimony in a deposition taken in the same case and testimony given on a former trial of the same case. Insofar as the former testimony exception is broader, it is a rule of evidence available only to the defendant.

If the Commission desires Revised Rule 63(3) to have the full meaning that was intended when the Commission redrafted this subdivision, Penal Code § 686 should be amended to provide an exception for hearsay generally. Then Rule 63(3) would be operative in criminal actions to the same extent that other exceptions to the hearsay rule are operative. Such an amendment would also be desirable as a declaration of the existing law insofar as hearsay generally is concerned. Without such an amendment, much of the language of Rule 63(3) and (3a) is meaningless.

It was pointed out in the prior Memorandum (No. 7 Supp. (1961)) that the second exception stated in Penal Code § 686 inaccurately states the existing law. Section 686 provides that a deposition taken under Section 882 may be read if the witness is dead, insane or cannot with due diligence be found within the state. However, Penal Code § 882 provides that depositions taken under its provisions may be read, except in cases of homicide, if the witness is unable to attend because of death, insanity, sickness, or infirmity, or continued absence from the state. Moreover,

Penal Code § 686 does not provide for the reading of depositions which are admissible under Penal Code §§ 1345 and 1362. These contradictions in the present statutory law should be corrected by substituting a general reference to depositions that are admissible in criminal actions for the present incorrect cross-reference to Penal Code § 882.

Penal Code §§ 1345 and 1362. The staff has previously suggested the substitution of a reference to Rule 62 for the present standards of unavailability contained in these sections. Section 1345 relates to depositions of witnesses who may be unable to attend the trial. The section states that such depositions may be read by either party if the witness is unable to attend by reason of death, insanity, sickness, infirmity or continued absence from the state. For practical purposes, the only change that will be made by the substitution of the cross-reference to Rule 62 will be to add privilege and disqualification as grounds of unavailability. Take this example:

> D is charged with manslaughter. D claims that X is the real culprit. X is ill and in prison anyway, so he testifies in a deposition that he in fact did commit the crime. The prosecution doesn't believe X and goes ahead with D's trial. At the time of trial, X has fully recovered and regrets having made his previous statement. D calls X as a witness, but X invokes the privilege against self-incrimination. D then offers the deposition. Objection.
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> Ruling: Objection sustained. X is not unavailable as defined in Section 1345 at the present time. If the Rule 62 definition of unavailability were substituted, the deposition

would be admissible just as it would be under existing law if X had remained ill.

Section 1362 relates to depositions of material witnesses who are out of the state. Such depositions may be taken only on application of the defendant. Under § 1362, the deposition is admissible if the deponent is "unable to attend the trial." The staff suggests the substitution of the Rule 62 definition of unavailability so that the defendant may introduce the deposition even though the witness actually attends the trial and invokes either privilege or disqualification and refuses to testify. Take this example:

> D has a reputation as a mobster, but has never been convicted of a serious crime. D is charged with bribery of public officials. X, a former public official suspected of receiving the bribe, has made his way to Mexico, and all attempts to extradite him have proved unsuccessful. D takes X's deposition under §§ 1349-1362 of the Penal Code. In the deposition, X testifies that D had nothing to do with the alleged bribe.
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> As the prosecution does not want to lose a golden opportunity to convict D of something, it offers to transport X to the trial of D and to return him again to Mexico without arresting him on the bribery charge. X attends the trial under these circumstances. X is not called by the prosecution, but is called by D. X invokes the self-incrimination privilege. D offers the deposition. Objection.
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> Ruling. Objection sustained. Under § 1362, the deposition

is admissible only if the deponent is unable to attend the trial. Since X is in attendance, even though he is privileged to refuse to testify, his deposition is inadmissible.

The substitution of the Rule 62 definition of "unavailability" would permit D to use X's deposition in these circumstances just as he would if X had still been in Mexico at the time of the trial.

Respectfully submitted,

Joseph B. Harvey
Assistant Executive Secretary

(Memo 39(1961)) EXHIBIT I 9/18/61

Research relating to Rule 62(6)

At the August meeting the staff was asked to do research upon the meaning of the language in Code of Civil Procedure Section 2016 "that the party offering the deposition has been unable to procure the attendance of the witness by subpoena." The staff was to determine whether this language requires a showing of diligence on the part of the person offering the deposition into evidence.

The language in Section 2016 was, of course, taken from Rule 26 of the Federal Rules of Civil Procedure. Although there is not a great deal of case law construing this provision of the Federal Rules, there has been some indication in the cases that more is required than a mere showing that the deponent is not present at the hearing. For instance, in Cullers v. Commissioner of Internal Revenue, 237 Fed.2d 611 (8th Cir. 1956) a deposition was held to be excluded from evidence properly where no showing was made of meeting any of the requirements of subdivision (d)(3) of Rule 26. Again in Andrews v. Hotel Sherman, 138 Fed.2d 524 (7th Cir. 1943) the court excluded a deposition from evidence with the statement (at page 529): "The deposition showed on its face that [the deponent] resided in Chicago and was employed at the Palmer House, and there is no showing that he was unable to be present in court to give his

testimony for any of the reasons set forth in § 26(d) of the Federal Rules of Civil Procedure . . . . It was not error to exclude this deposition."

It may be, however, that the showing required need not be extensive. In Frederick v. Yellow Cab Co. of Philadelphia, 200 Fed.2d 483 (3rd Cir. 1952), the deposition of an eye witness was taken because he was in the habit of being out of the city on business one or more days of each week. The witness was extensively cross-examined in the deposition. When the deposition was offered counsel stated that the witness was out of town, that he had called the witness' office and the secretary had said that the witness would be gone on the day of the trial and the following day. The court held, over objection, that the deposition was properly admitted under Rule 26(d)(3) on the ground that the proponent was "unable to procure the attendance of the witness by subpoena." The court said: "Unquestionably the showing on this issue was scant. Yet there was no showing at all in opposition . . . . On what was before him, the trial judge apparently concluded that the witness was in fact out of the jurisdiction and, therefore, that the procurement of his attendance by subpoena had not been practicable." It is apparent from reading this language that the court was confusing two provisions of Rule 26. Rule 26(d)(3) provides for the admission of a deposition either if the witness is out of the jurisdiction or if the proponent is unable to procure his evidence by subpoena. In this case it is apparent that the

court considered the proponent's showing as going to the absence of the deponent from the jurisdiction. If the showing for that purpose was adequate, whether he was able to procure his attendance by subpoena or not was irrelevant. The proponent's ability to procure the deponent's attendance by subpoena becomes material only if there is no showing that the deponent is out of the jurisdiction, for either ground suffices to permit the admission of the deposition.

Arizona, and a few other states, have also adopted the Federal Rules on the admission of depositions. In Slow Development Company v. Coulter, 353 P.2d 890, 895 (Ariz. 1960), the court held that a deposition was properly admitted under this paragraph because due diligence had been shown. Illinois, too, has adopted the Federal Rules on the admission of depositions. In John v. Tribune Company, 171 N.E.2d 432 (Ill. App. 1960), a deposition was admitted upon a showing by the proponent that his employee had attempted to subpoena the witness on the day before the trial and that a firm of attorneys that had represented the witness said that she was in Wisconsin. The court, on appeal, stated (at p. 442):

> The deposition should not have been permitted in evidence unless the defendant made a showing that the attendance of the absent witness could not have been procured by the use of reasonable diligence. An attempt to procure the witness the day before trial has been held to be a lack of diligence.

The authority of this case, however, as an interpretation of the Federal Rules is somewhat questionable, for in adopting the Federal

Rules Illinois modified them to a certain extent. Under the Illinois rules, a distinction is made between discovery depositions and evidence depositions. Under Illinois Supreme Court Rule 19--10 (Smith-Hurd Illinois Annot. Stats. c. 110 § 101.19--10) the admissibility of discovery depositions is quite limited. Evidence depositions, though, may be admitted for substantially the same reasons that depositions may be admitted under the Federal Rules. The committee report on the portion of the Illinois rules dealing with the admissibility of evidence depositions states:

> Subsection (3) is based upon Federal Rule 26(d)(3). Apart from language made necessary by the distinction between evidence and discovery depositions, this subsection differs from the Federal Rule in two respects: absence from the county rather than being beyond a one hundred mile radius of the place of trial is made the test in clause (b)(2); and a motion under clause (b)(5) respecting use of the deposition under exceptional circumstances must be made in advance of trial.

Clause (b)(4) of subsection (3) was modified before its adoption by the Illinois Supreme Court to read:

> The party offering the deposition has exercised due diligence but has been unable to procure the attendance of the deponent by subpoena.

It is apparent from the comment of the committee upon subsection (3) that they regarded this modification of language as clarifying rather than as changing the Federal Rule.

Commentators upon the Federal Rule, too, indicate that a showing of diligence is probably necessary under this portion of the Federal Rules. In 38 Col. L. Rev. 1436, 1447 (1938) in an article entitled "The New Federal Deposition-Discovery

Procedure," written by James A. Pike and John W. Willis, the following appears:

> The clause allowing the use of depositions when the proponent "has been unable to procure the attendance of the witness by subpoena" is new in federal practice and is evidently intended to cover a case in which the party cannot effectively prove that the deponent is over one hundred miles from the court, but has been unable to serve a subpoena on him. A showing of some diligence will probably be required.

In a note appended to this passage from the article it is stated:

> Return of subpoena "non est" is not enough to show non-availability . . . . At common law, inability to find deponent after diligent search was a ground of admission.

From the foregoing cases and comments it appears that a showing of diligence is probably required under the existing language of Code of Civil Procedure Section 2016(d)(3)(iv). Inasmuch as the requirement does not clearly appear from the language of Section 2016 the staff recommends that the language of paragraph (e) of Rule 62(6) be retained in the form that it appears in the tentative recommendation. This language has been previously approved by the Commission.

(Memo. # 39(1961)

EXHIBIT II

Research relating to Rule 63(22)

At the August meeting a sentence explaining the reason for this exception was deleted. The sentence read:

> Certainly evidence of this sort is superior to reputation evidence which is admissible on questions of boundary both under subdivision (27) and Code of Civil Procedure Section 1870(11).

The Commission directed the staff to do research upon this exception to determine the reason given for it in the cases recognizing the exception.

The source of the rule lies in the cases dealing with reputation. The general English rule relating to reputation is:

> Evidence of reputation is admissible where the question relates to a matter of general or public interest; as, for example, to the boundaries of a town, parish, or manor, or to the boundaries between counties, parishes, hamlets or manors, or between a reputed manor and the land belonging to a private individual, or between old and new land in a manor.
>
> [However,] evidence of reputation is inadmissible in cases of a private nature, for example, as to the boundaries of a waste over which some only of the tenants of a manor claim a right of common appendant, or as to the boundaries between two private estates, except where the private boundaries coincide with public ones. [3 Halsbury's Laws of England, 3d ed. 383-385.]

Originally the rule seems to have been that the verdict of a jury was itself evidence of reputation. The doctrine seems to have arisen in City of London v. Clerke, a Maltman, Carth. 416 (1691). That case did not involve a boundary, but involved the right of the city to collect a duty on malt brought to the city on the west country barges. It was there held that verdicts in four prior cases against west country maltmen were admissible. The reason given was that prior payments of such a duty by

other west country maltmen would have been admissible, therefore the prior recoveries against the other maltmen should also be admissible. Chief Justice Holt stated by way of illustration:

> If a Lord of a Manor claims Suit of his Tenants ad molendinum by Custom, &c. and in an Action recovers against one Tenant, that Recovery may be given in Evidence in a like Action to be brought against other Tenants upon the Reason supra, unless the Defendant can shew any Covin or Collusion between the Parties in the first Action, &c. quod nota.

In Tooker v. Duke of Beaufort, 1 Burr. 146 (1757), a commission under the seal of the Court of Exchequer to inquire as to the boundaries of a manor and the verdict of the jury made upon the inquisition were held admissible in a later action, though not conclusive.

Reed v. Jackson, 1 East 355 (1801), was an action for trespass. The defendant pleaded a public right of way over the land in question. The plaintiff offered in evidence the verdict he had obtained in another action against a different defendant who had also pleaded a public right of way. The evidence was held admissible. Justice Lawrence said "Reputation would have been evidence as to the right of way in this case; a fortiori therefore, the finding of twelve men upon their oaths."

These cases may be explained upon the ground that juries were originally selected from the vicinity and, therefore, should be expected to be familiar with the reputation in the neighborhood as to matters of public interest. This, at least, was the explanation given by Baron Alderson in Pim v. Curell, 6 M & W 234, 254 (1840) ("That was when the jury were summoned de vicineto, and their functions were less limited than at present"), and it is also Wigmore's view (5 Wigmore, Evidence 459 (3d ed. 1940)). Talbot v. Lewis, 6 C & P 603 (1834), also supports this view. There, Baron Parke held a 1635 verdict showing the boundaries of a manor admissible "as being the

opinion of persons whom we must presume to have been cognizant of the facts, it having reference to a subject on which reputation is evidence."

Eventually, of course, the English judges recognized that a verdict is not evidence of reputation. In Brisco v. Lomax, 3 N & P (1838), Justice Patteson remarked, "It is difficult to say that this commission was admissible as reputation, because the freeholders, being drawn at large from the County of York, could have no personal knowledge of the subject. . . . The verdicts are not by themselves evidence of reputation; but where reputation is admissible in evidence, verdicts are also." Eventually, too, the doctrine was broadened so that a decree of an equity court could be received. In Laybourn v. Crisp, 4 M & W 320 (1838), a decree was held admissible, Baron Parke stating: "I have never heard it doubted, that a decree of a Court of Equity is evidence of reputation in the same manner as a verdict." Some of the judges, too, became dissatisfied with the basis for the doctrine. During the argument in Evans v. Rees, 10 Ad. & El. 151 (1839), Justice Patteson remarked "I never could understand why the opinion of twelve men should be evidence of reputation", and Justice Coleridge said, "Though the doctrine is perhaps established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle."

Hence, in Neill v. Duke of Devonshire, L.R. 8 A.C. 135 (1882), the House of Lords attempted to give another explanation. There, former equity decrees were held admissible on a question of a public right to use a fishery. Chancellor Selborne conceded that "such evidence, though admissible in cases in which evidence of reputation is received, is not itself in any proper sense, evidence of reputation. It really stands upon a higher

and larger principle; especially in cases, like the present, of prescription. An adverse litigation before a competent court, supported by proofs on both sides, and ending in a final decree, comes within the category of res gestae, and of 'declarations accompanying acts' . . . ."

Lord O'Hagan agreed that the decrees "were admissible, not as evidence of reputation, . . . but of something higher and better than reputation," but he did not ground his decision on "res gestae." Rather, he believed the evidence better than reputation because "the decree was final, determining the only question before the court, and for its determination necessitating the production of evidence, the judicial conviction founded upon it, that a real, peaceable and unequivocal possession of the very subject matter now in dispute was enjoyed by the Earl of Cork 200 years ago. . . ." Lord Blackburn's reasoning was similar. His argument was that, although hearsay is generally excluded, "yet where the point to be proved is ancient possession before the time of living memory there is a wide class of exceptions, grounded on this; that there being no possibility of producing living witnesses to testify as to things that happened so long ago, the matter must remain unproved, unless the best evidence which, from the nature of the thing, can be produced, be received. And where the question is one of public interest, . . . evidence of reputation is admissible. The evidence afforded by a record shewing that a Court of competent jurisdiction inquired into and pronounced upon the state of facts, and the question of usage at a time before living memory, is perhaps not properly evidence of reputation that the state of facts, and the question of usage at that time were as there pronounced to be. But it is as strong or stronger than reputation, and the authorities are agreed that it is

admissible, at least in cases where reputation would be admissible."

Lord Blackburn's argument is the most convincing. It is merely that reputation is received generally because it is usually the best evidence, from the nature of the case, that can be produced. A judgment, however, in an adversely litigated case is a more reliable form of evidence than reputation; hence, since we are seeking the best evidence that from the nature of the case can be produced, a judgment upon a matter of public concern should be received if reputation is going to be received.

(Memo. #39(1961)) EXHIBIT III

Research Relating to C.C.P. § 1851

At the August meeting, the Commission directed the staff to do research upon the meaning of Section 1851 of the Code of Civil Procedure. The Commission was particularly interested in the type of evidence that is admitted under its provisions and the type of case in which it is applied.

Section 1851 provides:

> 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

First, as to the nature of the evidence admitted, two classes of cases may be found. One class of cases involved statements of a person (hereinafter sometimes called "the principal obligor") upon whose liability the person sued depends. These cases all involve statements that would be admissions if the declarant were sued directly. For example, in Standard Oil Co. v. Houser, 101 Cal. App.2d 480 (1950), the defendant guaranteed payment of a corporation's debts in order to induce the plaintiff to issue a credit card to the corporation. The corporation went bankrupt, and in an action against the guarantor to recover the amount of credit extended, the corporation's delivery receipts for gas and oil were held admissible against the guarantor as evidence that gas and oil had been received as indicated. Similarly, in Mahoney v. Founders' Insurance Co., 190 ACA 492 (1961), the deposition of the principal obligor was held admissible in an action against the surety company on his bond even though the principal obligor was present at the

trial. The court held that the deposition was admissible against the surety under Section 1851 as an admission of the principal obligor.

The other class of evidence admitted under Section 1851 consists of judgments against the person upon whose liability the defendant's obligation depends. In cases where such judgments are not conclusive, they are admitted as prima facie evidence under Section 1851. Ellsworth v. Bradford, 186 Cal. 316 (1921), is illustrative. At that time, California's Civil Code provided that a stockholder of a corporation was personally liable for a proportionate share of the corporate debts incurred while he was a stockholder. This liability was a direct and primary liability as an original debtor, and not a secondary liability as a surety or guarantor for the corporation. In Ellsworth v. Bradford, supra, the court held that a judgment against the corporation was evidence of the corporate indebtedness in an action against the stockholder upon his personal liability. Again, in Nordin v. Bank of America, 11 Cal. App.2d 98 (1936), the plaintiff had sued Eagle Rock Bank. The trial court's judgment was for Eagle Rock. Eagle Rock then sold out to Bank of America, who assumed Eagle Rock's liabilities. On appeal from the judgment for Eagle Rock, the appellate court reversed and ordered judgment entered for the plaintiff. Plaintiff then sued Bank of America. The judgment against Eagle Rock was held to be prima facie evidence of Eagle Rock's liability in the action against Bank of America.

No case has been found in which the "for" provision of Section 1851 has been applied. Certainly, so far as statements are concerned, the primary obligor's out-of-court statements would be inadmissible in an action against him as self-serving hearsay; hence, they would be

inadmissible under Section 1851. So far as judgments are concerned, a different principle is applied if the person on whose liability the defendant's obligation depends wins a judgment in the first action. This is the principle of estoppel by judgment. Under this principle, the judgment in favor of the primary obligor in the first action is conclusive, not prima facie evidence, in favor of the person secondarily liable in the second action. The rationale of the estoppel by judgment doctrine is set forth in C. H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp., 128 Cal. App. 376 (1932). In that action, the defendant was sued for illegally inducing Lillian Gish to breach her contract with the plaintiff. The defendant, however, was exonerated because in a previous action by the plaintiff against Lillian Gish for breach of contract the plaintiff lost. The court said:

> As a general proposition of law we might concede that the principle res judicata applies only between parties to the original judgment or to parties in privity with them. However, it seems settled law that lack of privity in the former action does not prevent an estoppel where the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other. Thus it is settled by repeated decisions that . . . . in actions of tort, if the defendant's responsibility is necessarily dependant upon the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way.

The rule is stated more succinctly in Triano v. F. E. Booth and Company, 120 Cal. App. 345 (1932): "[A] judgment in favor of the immediate actor is a bar to an action against one whose liability is derivative from or dependent upon the culpability of the immediate actor."

From the foregoing it appears that Section 1851 has been applied

in order to permit the introduction of admissions of a principal obligor and judgments against a principal obligor in an action brought against another person whose liability depends upon the liability of the principal obligor. No cases have been found permitting the introduction of any other type of evidence under this section. In particular, no cases have been found applying the section to permit the introduction of evidence which would have been evidence "for" the principal obligor.

We turn then to the relationship of the parties involved in the application of Section 1851. The section has been applied to its greatest extent in the principal-surety cases. These cases apply this section to permit the admissions of the principal to be used as evidence against the sureties. (Butte County v. Morgan, 76 Cal. 1 (1888).) There is not a great deal of distinction to be drawn between these cases and the principal-guarantor cases such as Standard Oil Company v. Houser, 101 Cal. App.2d 480 (1950).

However, the section has also been applied where the liability of the defendant is not a secondary liability such as that of a guarantor or a surety. Ellsworth v. Bradford, 186 Cal. 316 (1921), involved a direct and independent liability of the stockholder. Ingram v. Bob Jaffee Co., 139 Cal. App.2d 193 (1956), is similar in principle to the Ellsworth case. The Ingram case involved the statutory liability of the owner of a motor vehicle. The defendant had sold the car to X without complying with the Vehicle Code provisions relating to the transfer of ownership. At the time of the accident someone other than X was driving and the question arose whether X had given the driver permission to drive the car. A statement of X, "If I had known anything like this was going to happen,

I wouldn't have let her borrow the car," was held properly admissible against the defendant owner under Section 1851.

Although it is difficult to discover a distinguishing principle, for some reason Section 1851 has never been cited nor discussed in any of the cases dealing with the liability of an employer under the doctrine of respondeat superior. It would appear that a respondeat superior case would fall within both the language of Section 1851 and the principle upheld in Ingram v. Bob Jaffee Co., supra, and Ellsworth v. Bradford, supra. A review of the cases involving admissions of employees in respondeat superior cases indicates that the first cases arising involved statements by the employee which did not inculpate the employee himself. (For example, see Luman v. Golden Ancient Channel Mining Co., 140 Cal. 700 (1903).) Obviously these statements would not be admissions of an employee in an action against him and would be inadmissible hearsay. (Note, however, such statements are admissible against the employer under Rule 63(9)(a).) Later cases, involving admission of the employee's own liability, merely cite the former cases holding that the employee was not authorized to make that type of statement. (See for example Kimic v. San Jose-Los Gatos etc. Ry Co., 156 Cal. 379 (1909).) Thus in Shaver v. United Parcel Service, 90 Cal. App. 764 (1928) the driver's statement, "I could have stopped but I thought the trailer was going to stop," was admitted only as to the driver and not as to the employing corporation. (If both employer and employee are sued and the employer conducts the defense, a judgment against the employee is binding on the employer, even though the only evidence against the employee is his own admission. Gorzeman v. Artz, 13 Cal. App.2d 660 (1936).) Yet

the liability of the employing corporation was dependent upon the liability of the driver in that situation to the same extent that the liability of the motor vehicle owner was dependent upon the permission of the transferee in Ingram v. Bob Jaffee Co., supra. The liability of the employing corporation was dependent upon the driver's liability, too, in the same manner that the liability of the shareholder was dependent upon the corporate liability in Ellsworth v. Bradford, supra.

Subdivision (9)(c) of Rule 63 embodies the rule set forth in Section 1851 insofar as it applies to admissions of the principal obligor. The language of (9)(c) does not appear to be limited in any way so that there might be a narrower rule of admissibility under (9)(c) than there is under Section 1851. Subdivision (9)(c) does not cover the cases applying Section 1851 which involved judgments against the principal obligor. Moreover, subdivision (21), which relates to judgments against persons entitled to indemnity, does not cover the judgments which are now admitted under Section 1851. Subdivision (21) applies only in the situation in which the judgment is against the surety or the person otherwise secondarily liable and the judgment is offered in an action brought against the principal obligor by the judgment debtor. It does not apply where the judgment is against the principal obligor or the immediate actor and is offered by the judgment creditor. Although the statutes creating the stockholder's liability no longer exist, there are other situations in which the principle of Ellsworth v. Bradford, supra, will be applicable. As a matter of fact, the cases indicate that a judgment against the principal obligor would be admissible as prima facie evidence against another person in any case in which an admission

of the principle obligor would be admissible against another person under Section 1851. The Uniform Rules, as revised by the Commission to date, do not cover this aspect of Section 1851. Accordingly, the staff believes that it is necessary to retain Section 1851 or to draft another subdivision to include its rule insofar as it pertains to judgments. The staff recommends a new subdivision 21.1 reading as follows:

(21.1) When one of the issues in a civil action or proceeding is the legal liability, obligation or duty of a third person, evidence of a final judgment against such person to prove such legal liability, obligation or duty, when offered by a person who was a party to the action or proceeding in which the judgment was rendered.

COMMENT

This subdivision restates in substance a principle of existing California law which is found in Section 1851 of the Code of Civil Procedure.

EXHIBIT IV

Research on Sections 1893 and 1901

At the August meeting, the Commission asked the staff to review the cases interpreting Sections 1893 and 1901 of the Code of Civil Procedure to determine whether the term "public writings" used in them is broader in meaning than the term "official record" used in subdivision (17). The staff has concluded that it is not. If there is any difference in the meaning of the two terms, the term "official record" as used in subdivision (17) is probably the broader.

Section 1888 defines "public writings" as "the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this State, of the United States, of a sister State, or of a foreign country" and "public records kept in this state of private writings." Section 1894 divides public writings into four classes: "1. Laws; 2. Judicial records; 3. Other official documents; 4. Public records, kept in this State, of private writings." All other writings are private writings. (Section 1889.)

Under these sections it has been repeatedly held that all writings by public officers in the course of their duties are not necessarily "public writings". (Pruett v. Burr, 118 Cal.

App.2d 188 (1953); Coldwell v. Board of Public Works, 187 Cal. 510 (1921).) A record in a public office is a "public writing" only if it is itself an act or record of an act of a public officer. (Mushet v. Dept. of Public Service, 35 Cal. App. 630 (1917).) In Coldwell v. Board of Public Works, the Supreme Court held that "a large number of incompleted and unapproved maps, plans, estimates, studies, reports, and memoranda relating more or less directly to the Hetch Hetchy project, some of which [were] prepared or [were] in the course of preparation by the City Engineer's assistants, some of which [had] been left there by employees of previous administrations but none of which [had] been finally approved by the City Engineer or filed with the Board of Public Works or made a part of any public or official transaction" were not public writings within the meaning of Section 1888 of the Code of Civil Procedure. The Coldwell case involved a citizen's attempt to secure by mandamus the right to view and make copies of certain documents and data in the City Engineer's office of the City of San Francisco. The petitioner relied on Section 1892 of the Code of Civil Procedure which gives all citizens the right to inspect and make copies of "public writings". The Supreme Court, however, held that this material did not constitute public writings until it received "some official approval." Until such time the documents could not "be considered the act or the record of an act of the City Engineer or the Board of Public Works." Nonetheless, the

court granted the petitioner the right to inspect the document upon the authority of Political Code Section 1032 (now Government Code Section 1227). This section states "the public records and other matters in the office of any officer" are open to the inspection of any citizen of the State. The Supreme Court held that, although the City Engineer's records were not public writings, they were "other matters" in the office of the City Engineer and, therefore, were open to inspection.

Section 1893 provides that a copy of a "public writing", properly certified, is admissible as evidence with like effect as the original writing. Subdivision (17) provides that a properly authenticated copy of an "official record" is admissible to prove the content of the record. It is possible that the term "official records" may be narrowly construed to be the equivalent of "public writings"; however, it is also possible that the term "official records" might be construed somewhat more broadly. It may be construed to apply to any records of an officer or pertaining to an office. Such an interpretation would be much broader than the term "public writings", since by statute the term "public writings" is limited to the written acts or records of acts of public officers or boards of officers. Inasmuch as it is unlikely that the term "official records" can be given a narrower construction than "public writings", and since it is possible that it will be given a broader construction, the staff recommends that Section 1893

be amended as indicated in the tentative recommendation and that Section 1901 be repealed. This recommended course of action has been previously approved by the Commission.

(Memo. # 39(1961)

EXHIBIT V

Research relating to C.C.P. Sections 1920-1926

At the August meeting the staff was asked to review the cases interpreting these sections. The Commission wanted to know whether it is these sections that give force to recitals in public documents such as ordinances. The Commission also wanted to know if these sections permit the introduction of public documents without the testimony of the custodian or some other qualifying witness as is required under the Uniform Business Records as Evidence Act.

These sections have been considered in part by the Commission on a previous occasion. When the Commission considered subdivision (15) of Rule 63, it first deleted paragraph (c) of subdivision (15). Paragraph (c) permitted the introduction of statements in officials records if the public officer who recorded the statement had a duty to investigate and to make findings upon the matter recorded. This deletion left subdivision (15) with only paragraphs (a) and (b). These paragraphs provided that a statement in a public record was admissible if a public officer had a duty to make the report and either performed the act reported or observed the event reported. The Commission concluded that (15), as so modified, permitted less evidence to be introduced than may be introduced under subdivision (13), inasmuch as subdivision (13) does not require the recorder to have observed or performed the act recorded. As subdivision (15), as so revised, was much more restrictive than subdivision (13), the Commission decided to delete subdivision (15) entirely.

In analyzing subdivisions (15) and (13), reference was made to Sections 1920 and 1926 as well as the Uniform Business Records as Evidence Act. The general conclusion was then reached that any evidence admissible under Sections 1920 or 1926, and any evidence admissible under subdivision (15) as revised, was also admissible under subdivision (13). Not considered at that time was the question whether Sections 1920 and 1926 dispense with certain foundational evidence which is required by subdivision (13). That will be considered at greater length in this memorandum.

So far as recitals in ordinances and similar documents are concerned the cases indicate that Sections 1920 and 1926 are not necessary to give these recitals any special validity. The presumption of verity which attaches to recitals in public documents of various sorts is either created by specific statute or flows from the presumption--that official duty was regularly performed--stated in subdivision (15) of Section 1963. (County of San Diego v. Seifert, 97 Cal. 594 (1893) (ordinance); Merced County v. Fleming, 111 Cal. 46 (1896) (ordinance); Bray v. Jones, 20 Cal.2d 858 (1942) (tax delinquent list); Rediker v. Rediker, 35 Cal.2d 796 (1950) (recital in foreign divorce decree); Boyer v. Gelhaus, 19 Cal. App. 320 (1912) (recital in tax redemption certificate).) Of course, cases may be found in which Section 1920 has been cited for the proposition that a statement in a public record is prima facie evidence of the facts recorded; however, it appears likely that these cases could as well have been decided on the basis of the presumption in Section 1963. A typical case is People v. Ontario, 148 Cal. 625 (1906) in which a finding that a petition was acted on at a regular or adjourned meeting of the city council was held to be supported by minute entry

indicating that the meeting was an adjourned meeting. The court relied on Section 1920 to arrive at its decision. However, it seems likely that the court could have relied on the presumption stated in Section 1963 just as the court did in County of San Diego v. Seifert, supra, where a similar problem was involved (regularity of meeting at which ordinance was adopted).

Although many cases can be found in which the rule of Sections 1920 and 1926 has been stated and followed -- that an entry in a public record is prima facie evidence of the facts stated, there are other cases indicating that these sections do not mean what they say in all situations. There are a large group of cases which have held that entries made by officers or boards of officers in the course of official duty are inadmissible hearsay. For instance, in Ogilvie v. Aetna Life Insurance Company, 189 Cal. 406 (1922), a written report of the findings of the county autopsy surgeon was offered in evidence. The Supreme Court said that the report should have been excluded as it was hearsay. In McGowan v. Los Angeles, 100 Cal. App.2d 386 (1950), a blood alcohol report from the county coroner's office was held inadmissible because no adequate foundation was laid showing that the blood analyzed was from the proper victim, even though the container of blood was so labeled. Yet in Nichols v. McCoy, 38 Cal.2d 447 (1952) a similar blood alcohol report was admitted because a proper foundation under the Uniform Business Records as Evidence Act was laid.

These cases hold that Sections 1920 and 1926 do not make an official report admissible when oral testimony of the same facts would be inadmissible. (Reisman v. Los Angeles City School District, 123 Cal. App.2d 493 (1954).) The McGowan and the Nichols cases seem to indicate, as

does Pruett v. Burr, 118 Cal. App.2d 188 (1953), that in some instances a foundation under the Uniform Business Records as Evidence Act must be laid even though the document is an official record and contains an entry by a public officer. There are, however, other cases involving public records and reports in which the foundational requirement set forth in the Uniform Business Records as Evidence Act was not laid. For instance, in People v. Williams, 64 Cal. 87 (1883), a census report certified by the superintendent of the census was admitted to show the population of the City of Santa Barbara. The certified copy sufficiently identified the document, but there is no indication that any witness was called to testify as to the mode of the document's preparation. Similarly, in Vallejo etc., R.R. Company v. Reed Orchard Company, 169 Cal. 545 (1915), a report of the State Agricultural Society showing the production of various counties in pounds, tons or other measures was held admissible even though no qualifying witness was called. It should also be noted that these cases also involved official records containing reports based on information not known personally to the recording officer.

Thus, it appears that in some cases it is necessary to call a witness to qualify the official reports under the Business Records as Evidence Act and in other cases it is not necessary. In some cases an official report has been held inadmissible because the recording officer could not give oral testimony as to the same facts; yet in other cases official records have been admitted under these sections when the officer who made the report could not have testified orally to the same facts.

So far as reports based on hearsay are concerned, the cases admitting such reports can probably be explained by the fact that the

admissible official reports are based upon statements which some person had a legal duty to make. The census records are based on a great many individual reports filed by individual enumerators. In Orange County Water District v. City of Riverside, 173 Cal. App.2d 137 (1959), the admitted reports were based upon reports of water users which were filed with the water district as required by law. Thus, these cases under analysis do not seem to lay down a requirement greatly different from that laid down by the Uniform Business Records as Evidence Act. Under the Business Records Act, too, the report need not be of facts personally known to the recorder so long as someone within the business had a business duty to report them. (Witkin, Evidence § 290.) Apparently, official records are also admissible even though the recorder did not have personal knowledge of the facts recorded so long as some person had a legal duty to report the facts to him. Official records based upon reports made by persons without such a legal duty seem to have been held inadmissible as a general rule.

The only remaining problem, then, is: when is it necessary to call a qualifying witness? Perhaps the fact that some cases admit official records without a qualifying witness and other cases do not may be explained by the fact that in some cases the court may take judicial notice of the manner in which the report was prepared and in other cases it cannot. For instance, in the Orange County Water District case, the court could determine the manner in which the report was prepared by reference to the statute requiring the reports to be filed and by relying on the presumption that the duty had been regularly performed. The same may be said of the census reports. As a matter of fact, in People v. Williams, supra, the court did cite the federal statutes setting forth

the census procedure. The explanation for McGowan v. Los Angeles, supra, and Nichols v. McCoy, supra, then would be that the court had no way of determining for itself the method in which the coroner's report was prepared so as to tie the report properly to the victim. Hence, it was necessary for a qualifying witness to testify. Accident reports (Hoel v. Los Angeles, 136 Cal. App.2d 295 (1955)) and other reports of a similar nature (Behr v. Santa Cruz County, 172 Cal. App.2d 697 (1959)) would be inadmissible under this rationale unless the qualifying witness were called to testify that the document contains a reliable report. In the absence of such testimony, the court cannot know whether or not the report is based on statements of persons who had no duty to report the facts to the officer.

If the foregoing is a correct analysis of the cases, it appears that subdivision (13) may require a foundation for the admission of official records to be laid by the testimony of a witness in all cases while such a foundation is not required in all cases by Sections 1920 and 1926. The language of subdivision (13) requires a qualifying witness in all instances; but, apparently the cases construing Sections 1920 and 1926 do not require such a qualifying witness when the court is able to take judicial notice that the report was prepared in a reliable manner. If the Commission wishes to preserve this aspect of Sections 1920 and 1926, it may take either of two courses of actions:

(1) Subdivision (13) may be revised by adding a provision that a record may be identified and its mode of preparation determined by evidence other than the testimony of the custodian or other qualifying witness. This revision would permit the court to determine the

trustworthiness of the record by taking judicial notice of the statutory requirements for the preparation of certain records.

(2) Another method of preserving the principle of Sections 1920 and 1926 would be to approve a modified version of subdivision (15). Such a version would read as follows:

> (15) Written reports made by a public officer or employee of the United States or of a state or territory of the United States, if the judge finds that the making thereof was within the scope of the duty of such officer or employee and that the sources of information, method and time of preparation were such as to indicate its trustworthiness.

Such a subdivision would, in effect, preserve the existing law by permitting the court to determine the trustworthiness of the record either by the testimony of a qualified witness or by taking judicial notice of the method in which the record was prepared.

If either revision is approved, the staff believes that Sections 1920 and 1926 may be repealed without changing existing law relating to the admission of official reports. The Commission has previously approved the repeal of these sections.